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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 15.

FLEISHER ENGINEERING & CONSTRUCTION CO. and JOSEPH A. BASS, doing business as Joseph A. Bass Co. *et al.*,

Petitioners,

VS.

UNITED STATES OF AMERICA for use and benefit of George S. Hallenbeck, doing business under the assumed name and style of Hallenbeck Inspection and Testing Laboratory,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI.

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Statement.

The respondent, if we understand him correctly, seeks to sustain the judgments under review only upon a theory of "liberal construction" of the Miller Act.

It is our contention that relief which he asks for can be granted only by act of Congress and not by judicial construction of the statute.

POINT I.

The Miller Act is in no sense of the word a remedial statute. On the contrary it creates a new cause of action and a new liability entirely unknown to the common law. Such statutes so far as jurisdiction is concerned must always be strictly construed. (See Point II, pages 14-22 of our principal brief.)

The Miller Act does not purport to amend the Heard Act. That statute was entirely repealed. Instead thereof the Miller Act was enacted, differing in many essential points from the Heard Act, among which differences are the following:

The bond required in the Heard Act is changed into two bonds.

One is a performance bond in which the government alone is interested. The other is a payment bond in which the creditors alone are interested.

Instead of a single action for the benefit of the government and all creditors, each creditor may maintain a separate action for his own benefit, in which no other creditor can intervene.

The Miller Act does not require a period of six months for the government to act before a creditor can do so, but the creditor himself can bring an action within the statutory period after his own cause of action accrues.

In both, suits are made dependent upon certain conditions. The right of the creditor under both statutes

is limited in time to a definite period "from the completion and final settlement of the contract."

The Miller Act has added a further condition applicable only to creditors of subcontractors making their right of action dependent upon notice required to be given in a very specific and definite manner. The Miller Act is, therefore, strictly an act in derogation of the common law.

POINT II.

The liberality of construction of the Heard Act never applied to matters of jurisdiction.

Before any laborer or materialman under the Heard Act, and equally under the Miller Act, can obtain any benefits under the statute he must comply with all of the preliminary statutory requirements. Under the Heard Act "the suit" must be "brought within the period prescribed by the act."

> Illinois Surety Company vs. Davis, 244 U. S. 376, 380, (cited on pages 17 and 18 of the respondent's brief).

Under the Miller Act the requirement for notice in a proper case and the manner in which it shall be given is just as definitely a condition precedent to the right to sue as is the other.

After full compliance with jurisdictional requirements liberality with respect to strictly procedural matters thereafter is quite properly admitted, but not otherwise.

POINT III.

Answering Point II (pages 8-11) of the respondent's brief. See Point III (pages 23-30) of petitioner's brief.

There is no ambiguity pointed out in the Miller Act. We submit that none exists.

The respondent has lifted from the context certain sentences and expressions found in various cases without any reference to the subject under consideration, or of the pertinency of the quotations to the subject intended to be decided by the court. With respect to these decisions we respectfully submit the following supplementing what is found in the respondent's brief.

1. Surace vs. Danna, *et al.*, 248 N. Y. 18, construes the provisions of the New York State Workmen's Compensation Law, section 33, reading as follows:

> "Compensation or benefits due under this statute shall not be assigned, released, or commuted except as provided by this chapter and shall be exempt from all claims of creditors and from levy, execution and attachment, or other remedy for recovery or collection of a debt, which exemption may not be waived."

The employee in that case had been awarded $3500.00 under the act for injuries suffered in the course of his employment. He had received the money and deposited it in a bank. One of his creditors attempted to levy upon it, claiming that the exemption from levy only applied to benefits due and unpaid, and that as

soon as the benefits were paid the exemptions ceased. The court construed the act to mean that the exemption continued after payment over as well as before, pointing out that it would be a strained construction which would produce the result claimed by the creditor, and harmonizing the statute with numerous pension laws referred to. Instead of presenting a situation where the court sustained a right, or liability, by some so called liberal construction, it is a case where the court followed the words of the statute considered literally but with their true meaning.

2. U. S. vs. Beaver Run Co. 99 F. (2nd) 610. This was a controversy over priority of a mortgage lien upon property as against a government tax lien upon the same property. The government had failed to file the notice of the tax lien as required by the statute, but sought to sustain priority by reason of the fact that the person against whom the lien was asserted had actual knowledge of the lien when he acquired the property.

The decision sustains exactly what we have contended for in this case. The court refused to read into the statute any limitation based upon any equitable doctrine of *bona fide* purchasers without notice. On page 612 of the opinion the court said: "Whether a statute creating a lien is to be given a liberal or strict construction, it is well established 'that the correct operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons and conditions provided for by statute, and then only where there has been at least a substantial compliance with all of the statutory requirements.'"

The quotation from the opinion, therefore, found on pages 9 and 10 of the respondent's brief, is significant only to the contrary of what is asserted. The following words found in the opinion immediately after the quotation in the respondent's brief are significant:

> "In the instant case, however, literal interpretation of section 3186 does not contain hidden ambiguities, does not defeat the object intended by Congress, and does not result in any shocking absurdity."

3. Boston Sand & Gravel Co. vs. U. S., 278 U. S. 641. This was an admiralty case and the controversy was whether or not the statute authorized the recovery of interest when damages were awarded against the government. The statute itself was silent on the subject. The court found that many provisions of law on that subject must have been in the mind of Congress when it enacted the statute in question, and inasmuch as the statute did not by express terms include interest, it must have been the intention of Congress not to provide for it. Under the circumstances so clearly pointed out in the opinion, it would seem that no other conclusion could be arrived at except by reading into the statute what manifestly was not intended to be put therein.

4. U. S. vs. Lewis, 192 Fed. Rep. 639. We can find nothing in this case pertinent to any proposition now before the court.

5. Tillinghast vs. Tillinghast, 25 F. (2nd) 531. In this case a husband had obtained a final decree of annulment of his marriage. By statute such a decree

was not effective until the time to appeal had expired. The wife, defendant, against whom the decree had been obtained, remarried before the expiration of the time to appeal. Subsequently her second husband claimed that his marriage was illegal because the divorce had not become operative. The court held that the right to appeal was a right for the benefit of the wife which she could waive if she saw fit to do so. That when she remarried, as permitted to do by the decree, she waived her right to appeal and, therefore, that the second marriage was valid. The relevancy of that decision to any question before the court in this case is not apparent.

6. State vs. Thompson, (Mo.) 5 S. W. (2) 57; 319 Mo. 492. This case is one which we should have cited in our own brief had we known of its existence. The case is one of mandamus to compel a state auditor to issue a warrant for expenses incurred by the relator in connection with the performance of his duties as secretary of a statutory commission. The auditor claimed that by the terms of the statute creating the commission its existence had expired. The relator claimed that it was permanent. The rule of statutory construction was declared as follows (quoting from a leading text writer):

> "'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its

meaning beyond the statute itself'." (Many authorities cited.)

The court then quoted another text writer as follows:

> " 'If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.* * * '
>
> Relator is not seeking a construction of the act, but insists that we amend it by adding 'and until their successors are appointed and qualified'. This we are without authority to do."

On this subject of statutory interpretation since the petitioner's brief was printed, there has been published a decision of the New York Court of Appeals which should be called to the attention of this court. The question involved was compensation of a justice of the peace for services rendered for holding criminal court as magistrate. The right depended entirely upon the interpretation of the various statutes on the subject which are set forth, so far as necessary, in the opinion itself. The court said:

> "We are asked to go back of the wording of the statute" (Town law, sec 27, subdivision 2, quoted on page 339 of the opinion) "to various legislative documents to enlighten ourselves as to the

intent of the legislature in enacting that provision. We think such a course is not permissible under the circumstances of this case. We are bound, of course, in interpreting a statute to construe it in view of other statutes relating to the same subject matter, in accordance with the sense of its terms and the intent of the framers of the law. However, 'that intention is first to be sought from the words employed, and if the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation.' (Settle vs. Van Evrea, 49 N. Y. 280, 281.)"

Town of Putnam Valley vs. Slutzky, 283 N. Y. 334, 343.

7. Commonwealth vs. Barney, 115 Ky. 475. This case had to do with a Kentucky Criminal statute enlarging the common law liability for fraud and providing a penalty. The question was whether the title of the act under the Kentucky constitution should be read in as a part of the enactment. In his quotation from the case the respondent's attorney inadvertently omitted one sentence which would be the second sentence in his quotation. The opinion (the missing sentence being supplied, italics ours), reads as follows:

"Even as read in entire harmony with its title, the terms of this statute are very general, and, if liberally construed and literally applied, would be most comprehensive and far reaching. *It is true that which is plain needs no interpretation.* At first reading this statute may appear plain enough etc."

POINT IV.

Answering Points III and IV of respondent's brief.

Even if the Miller Act should be held to be liberal in its nature, no rule of construction justifies the inclusion within its benefits of persons not specifically named or referred to therein, and even in cases where liberal construction can be allowed the language of the statute itself must be followed where it is clear, definite and not at all obscure or ambiguous. That is well illustrated in many of the cases cited by the respondent.

1. In Lockhart vs. Hoffman, 197 N. Y. 331, the statute there construed was a part of the labor law of the State of New York which required all hoists used in construction of buildings to be erected inside of the buildings and not outside. An attempt was made to apply that statute where a hoist was used outside of the building which was being repaired. The court refused to accept the liberal construction asked for because the statute did not so provide, saying that remedial statutes should be liberally construed only "when it is possible to do so without doing violence to the language." See page 535 of the opinion.

2. Thompkin vs. Hunter, 149 N. Y. 117, was a case under the New York State General Assignment Law quoted in the opinion at page 120. The statute forbade an assignor to prefer more than a certain percentage of his creditors when he made a general assignment. The case cited held that where the assignor while insolvent and shortly prior to his assignment

transferred all of his property to one creditor, that he did not violate the provisions of the statute against preference because the transfer was separate and distinct and apart from the assignment, refusing to liberalize the statute by such a construction as would include the transaction in question.

3. Baxter vs. McGee, 82 F. (2nd) 695. This case simply interprets a statute declared to be "apparently ambiguous" and what was stated in the opinion had reference to ambiguous statutes.

4. People *ex rel.* Wood vs. Lacombe, 99 N. Y. 43. This case is authority merely for the proposition that a reasonable construction going outside of the words of the statute should be adopted only in cases where there is doubt or uncertainty in regard to the intention of the law makers. See page 49 of the opinion.

5. State vs. Baldwin, 62 Minn. 518, cited on page 13 of the respondent's brief, refuses on any theory of liberal construction to read into a tax law authority to charge interest against delinquent taxpayers.

None of the other cases cited by the respondent hold anything different from the above. None of them are cases where any statute was construed for the benefit of any person not named therein, as would have to be done in this case, if the benefit of the statute should be extended by implication to include laborers and materialmen having no contractual relation with the contractor and who have not exactly complied with the statute on the subject of notice.

POINT V.

The alleged notice which forms the foundation of the respondent's action in order to be effective confessedly needs very liberal construction (R. 30 and 31). See Point VII of petitioner's brief pages 43-45 and pages 17-19 of respondent's brief.

In all cases of liberal construction of documents or statutes the intent behind it must be such as to justify the liberality of construction prayed for in order to accomplish it.

An inspection of this document shows plainly two things.

1. The author of it had no thought when he wrote it that it constituted notice to the contractor, Fleisher Engineering & Construction Company, nor any intention that it should do so.

2. It is equally clear that when Fleisher Engineering & Construction Company received a carbon copy of it, no thought could have been conveyed that such was the effect of it. Both of these propositions are apparent from an inspection of the document itself. It needs no other argument.

It is, therefore, respectfully submitted that the judgment of the courts below should be reversed and that the defendant's (petitioner's) motion for summary judgment dismissing the complaint should be granted.

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